

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

In the Matter of )  
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Amendment of the Commission's )  
Rules to Preempt State and Local )  
Regulation of Tower Siting For )  
Commercial Mobile Services Providers )

RM - 8577

To: The Commission

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**REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS  
INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA"),<sup>1</sup> hereby submits its Reply to comments occasioned by CTIA's Petition For Rulemaking with respect to tower siting. In the petition, CTIA asked the Commission to exercise its authority under § 2(b) and § 332(c) of the Communications Act of 1934, as amended,<sup>2</sup> to preempt state and local governments from enforcing zoning and similar regulations which have the effect of barring

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<sup>1</sup> CTIA was established in 1984 as the trade association of the cellular industry. Today, CTIA represents the wireless industry, with membership open to all members who provide commercial mobile radio services. CTIA's members include companies with an interest in PCS, over 95 percent of the licenses providing cellular service to the United States, Canada, and Mexico, and the nation's largest providers of enhanced specialized mobile radio ("ESMR") service. CTIA's membership also includes cellular equipment manufacturers, support service providers, and others with an interest in the wireless industry.

<sup>2</sup> 47 U.S.C. §§ 152(b), 332(c).

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or impeding commercial mobile radio service ("CMRS") providers from locating and constructing new towers.

## **I. INTRODUCTION**

Based on the record assembled in initial comments, the Commission should initiate a Notice of Proposed Rulemaking. Some commenters argue that the Commission needs to address important issues arising from the preemption. That, of course, is not a reason to forgo the NPRM.

## **II. THE FACTS PRESENTED WARRANT THE ISSUANCE OF A NOTICE OF PROPOSED RULEMAKING**

### **A. Commenters Have Established That Significant Problems Exist In The Siting Of CMRS Towers**

The comments received to date provide numerous examples of serious CMRS tower siting problems.<sup>3</sup> The examples range from excessive delays and costs<sup>4</sup> to express moratoria on tower authorizations.<sup>5</sup> In total, commenters listed approximately 70 examples of problems attributable to local zoning restrictions in 19 states and Puerto Rico.<sup>6</sup> For example, McCaw Cellular reported 16 instances of state and local CMRS tower siting problems.<sup>7</sup> The

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<sup>3</sup> See, McCaw Cellular at 11-19; Frontier Cellular at 7-9; NYNEX at 5-7; Southwestern Bell at 8-15; USCC at 4-15; Sprint at 4-9; Pacific Telecom Attachment; Vanguard Cellular at 2-5; PCIA at 4-6; APC at 2-5; Cellular Comm. of Puerto Rico at 2-4.

<sup>4</sup> See, e.g., Frontier Cellular at 7-9.

<sup>5</sup> See, e.g., McCaw Cellular at 11-12.

<sup>6</sup> Moreover, due to the aggressive filing deadlines in this proceeding, the number of examples only scratches the surface of the problems faced by CMRS providers at the local level.

<sup>7</sup> McCaw Cellular at 11-19.

problems include a Tarrytown, NY ordinance that effectively bans the placement of any new cell-sites<sup>8</sup> and an East Brunswick, NY ordinance that mandates cell-sites be at least 5 miles away from other towers.<sup>9</sup> Frontier Cellular reported five specific local CMRS tower siting problems.<sup>10</sup> The five siting problems have cost Frontier more than \$350,000 in regulatory and legal fees.<sup>11</sup> Thus, the record now establishes the very significant costs and delay that face the CMRS industry without preemption of local zoning rules.

**B. The Creation Of A National Board To Establish National Tower Siting Standards Is Unnecessary**

In CTIA's view, a national board, as proposed by GTE,<sup>12</sup> to develop consensus national tower siting zoning standards is not required. The issue that CTIA's petition raises is very straightforward. Zoning requirements cannot, consistent with the mandates of the Communications Act, be employed to impede or prevent the construction and operation of CMRS infrastructure.<sup>13</sup> Any effort to arrive at a form of national consensus on zoning matters seems fraught with difficulty, given the vastly different

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<sup>8</sup> Id. at 11.

<sup>9</sup> Id. at 13.

<sup>10</sup> Frontier Cellular at 7-9.

<sup>11</sup> Id.

<sup>12</sup> GTE at 9-11.

<sup>13</sup> Some commenters have asserted the impossibility of national administration of zoning functions. See, e.g., Carroll County at 1; Duncan, Weinberg, Miller & Pembroke at 3.

interests that would be involved. Fortunately, the task need not be undertaken. The issue is not whether a national consensus can be achieved, but rather whether the national legislature's determination that CMRS entry is of primary importance must accommodate local zoning concerns or whether, in the event of conflict, the zoning authorities must accommodate Congress.

### **III. LOCAL REGULATION OF OTHER TERMS AND CONDITIONS CANNOT DIRECTLY OR INDIRECTLY PRECLUDE CMRS ENTRY**

Some parties assert that because the regulation of "other terms and conditions" in § 332(c) of the Communications Act is not preempted by Congress, the Commission cannot preempt local zoning laws.<sup>14</sup> This reflects a misapprehension about § 332, which makes open entry into (and the concomitant competitive provision of) CMRS the primary value. Properly read, § 332(c) declares that state and local governments cannot pass any regulations adversely affecting entry. Therefore, any state and local zoning or other land use rule, direct and indirect, that prohibits or impairs entry is preempted.

Zoning rules that act as a direct bar to entry -- for example, like moratoria on towers -- are preempted. Zoning rules that indirectly affect entry can have equally damaging results for CMRS providers and customers, and are also preempted.<sup>15</sup> The necessity for preemption is reflected in the stark inconsistency between the Commission's build out requirements for PCS and the

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<sup>14</sup> See, e.g., National Resources Defense Council at 3.

<sup>15</sup> See, e.g., Palmer Communications at 3-4.

delays often experienced by wireless licenses in securing local authorizations for installations of antennas. Local zoning actions that delay the provision of wireless services erect barriers to licensees ability to meet the aggressive construction deadlines the Commission has imposed. If a license carries a construction deadline, delay in tower construction jeopardizes the provider's license.

#### **IV. OTHER ISSUES**

##### **A. The Preemption Of Local Zoning Rules Will Not Conflict With FAA Regulations**

The Airline Owners and Pilots Association ("AOPA") argues, among other things, that because the Federal Aviation Administration's ("FAA") Part 77 airspace obstruction determination includes a disclaimer that there are "other authorities (state and local) with control of the appropriate use of property beneath airspace," preemption of state and local law and regulations is at odds with the "Federally recognized responsibility of state and local governments."<sup>16</sup> This is a misapprehension. First, the Petition does not seek to usurp or contradict any established FAA tower siting rules. The petition is premised on § 332(c)'s preemption of state and local regulation and does not seek a declaration that § 332 of the Communications Act constitutes an implied repeal of the Federal Aviation Act or any other federal statute. Second, the mere fact that the FAA acknowledges that there may be other state and local

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<sup>16</sup> AOPA at 2.

rules an applicant may have to observe in erecting a tower does not mean that the FCC is precluded from preempting those other state and local rules. The FAA does not reserve a specified role for state and local governments in the siting of towers in its advisory, rather, it issues the advisory to ensure that Part 77 applicants are aware that the FAA's authorization may not be the only authorization required to erect the tower.<sup>17</sup> There is no conflict with the FAA rules stemming from FCC preemption of local CMRS tower zoning rules.<sup>18</sup>

**B. CTIA Does Not Propose That The FCC Become A National Zoning Board**

Some commenters state that the FCC should not commence with an NPRM because if the Commission preempts local CMRS zoning laws it will become a national zoning board for CMRS towers.<sup>19</sup> CTIA is not proposing the FCC substitute itself for local zoning boards. Instead, CTIA is petitioning the Commission to bar local

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<sup>17</sup> See 14 C.F.R. §§ 77.1-77.75 (demonstrating that the FAA does not reserve a role for states and local governments in the siting of towers).

<sup>18</sup> AOPA makes a second point that local communities are required to abide by certain assurances when they receive airport improvement grants from the FAA. AOPA at 2-3. One of these assurances concerns local communities taking appropriate action that the immediate vicinity of the airport is "compatible with normal operations, including landing and takeoff aircraft." *Id.* AOPA appears to make the argument that if the Commission preempts state and local zoning authority, it will conflict with FAA assurances for improving airports. This assumption is incorrect. CTIA does not object to the reconciliation of CMRS siting preemption and any FAA rules. The FAA policy is clearly a matter of ensuring air safety, not local zoning.

<sup>19</sup> Carroll County at 1; Duncan, Weinberg, Miller, and Pembroke at 3.

governments from imposing unreasonable zoning and land use regulations that directly or indirectly affect entry in an adverse way.

**C. Radiofrequency Energy Issues Should Be Considered Separately From CTIA's Petition**

Several commenters raised the issue, both pro and con, of electromagnetic radiofrequency ("RF") emissions.<sup>20</sup> CTIA did not address RF issues in its Petition for Rulemaking. Instead, CMRS RF preemption issues should be considered as part of the pending petition for rulemaking filed by the Electromagnetic Energy Association ("EEA") to consider rules preempting state and local oversight of RF exposure from all FCC-authorized transmitters.<sup>21</sup> This is the appropriate procedural device for considering the much broader RF issue, and CTIA urges the Commission to act on EEA's petition without delay.

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<sup>20</sup> See, e.g., City of Stamford at 1; PageNet at 4-5.

<sup>21</sup> Petition For Further Notice of Proposed Rulemaking in ET Docket No. 93-62, filed by EEA (Dec. 22, 1994).

**V. CONCLUSION**

Based on the record assembled in the initial comments, the Commission should initiate a Notice of Proposed Rulemaking to preempt state and local tower siting rules that prohibits or impairs entry into CMRS.

Respectfully Submitted,



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